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No. 02-626

Supreme Court, U.S.
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In The
Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL TRIBAL ENVIRONMENTAL COUNCIL AND THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a massive pump system and storm sewer that back-pumps pollutants from a 71-square-mile drainage area of Broward County into the Everglades and onto Miccosukee tribal lands through four huge pipes is a "point source" under the Clean Water Act obliged to secure an NPDES permit?

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INTEREST OF AMICUS CURIAE[1]

Amici Curiae, National Tribal Environmental Council (NTEC) and National Congress of American Indians (NCAI), are organizations that represent the interests of federally recognized Indian tribes. NTEC, which was formed in 1991, is a membership organization dedicated to working with and assisting tribes in the protection and preservation of the reservation environment. NTEC's mission is to enhance each tribe's ability to protect, preserve and promote the wise management of air, land and water for the benefit of current and future generations. NTEC membership is open to federally recognized tribes throughout the United States, and currently has 178 member tribes. NCAI, which was founded in 1944, is the oldest and largest organization of tribal governments in the United States. Today, its membership includes 250 tribes from across the Nation. Its mission is to inform decision-makers about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

Amici's member tribes have natural resources upon which they depend for their survival, including in many cases, off-reservation hunting, fishing and gathering

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[1] Counsel for Petitioner and Counsel for Respondents both consent to the filing of the Brief of Amicus. Their letters are submitted for filing herewith. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amici Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

rights, which are often necessary for subsistence.[2] Tribal resources and rights are jeopardized if point sources are free to discharge pollution, unchecked, to their detriment. Like the Miccosukee Tribe here, Amici's tribes must be able to rely on the regulation and permitting of polluting effluent discharges from point sources under the Clean Water Act's National Pollution Discharge Elimination System provision to protect their interests. As the protective scope of that provision is being challenged here, Amici have a substantial interest in this case. A further interest derives from the significant role Indian tribes play under the Clean Water Act, which was expanded by the Congress in 1987 to afford tribes "Treatment as States." 33 U.S.C. § 1377(e). This provision enables tribes to acquire permit-issuing and other authorities over activities that pollute on-reservation and that would otherwise be regulated directly by the Environmental Protection Agency.[3] Authority

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[2] *See, e.g., Minnnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[3] The statute provides that: "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(Continued on following page)

that may be exercised by Indian tribes includes NPDES issuance under section 402, which is the subject of this case. Twenty-seven Indian tribes have received treatment-as-state approvals – all of which have been upheld by the courts.[4] Since many tribes exercise authority pursuant to the "treatment as state" provision, and many more may do so in the future, the Court's decision as to the reach of "point source" authority is vitally important to Amici.

STATEMENT OF FACTS

The Miccosukee Tribe is a federally recognized Indian tribe that counts the Everglades of South Florida as its homeland.[5] The Tribe and its members have numerous properties in this region, among them 189,000 acres in Water Conservation Area 3A which are held under "perpetual lease" from the State of Florida – a lease which the Tribe accepted in exchange for relinquishing all of its aboriginal title claims in Florida. *See Miccosukee Tribe of*

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(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e).

[4] *See, e.g., City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

[5] *See* BUFFALO TIGER & HARRY A. KERSEY, JR., A LIFE IN THE EVERGLADES (2002) (hereinafter "2002 Tiger"). On tribal history within the park, *see* ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS & NATIONAL PARKS, ch. 6 (1998).

Indians of Florida v. United States, 980 F. Supp. 448, 452-53 (S.D. Fla. 1997). Within the leased area the Tribe has perpetual rights to reside, to exercise religious functions, to take and use native materials, and to engage in agricultural, hunting, fishing, and frogging activities. *Id.* at 453. Tribal members also have recognized subsistence hunting, fishing and gathering rights in both the Big Cypress National Preserve and the Everglades National Park. *See* 25 U.S.C. §§ 1742(6), (8), 1750a(7). In addition, the Tribe also has the exclusive right to use and occupy a 667-acre strip known as the Miccosukee Reserved Area on the northern edge of the Everglades National Park. *See* Miccosukee Reserved Area Act, Pub. L. No. 105-313, 112 Stat. 2964 (1998). Finally, the Federal Government holds 75,000 acres of land, known as the Miccosukee Federal Indian Reservation, in trust for the Miccosukee Tribe. Almost 50,000 acres of the Reservation are located within Water Conservation Area 3A. *See Miccosukee Tribe of Indians*, 980 F. Supp. at 452; 25 U.S.C. § 1750d.

The Everglades "begin" at Lake Okeechobee, Marjorie Stoneman Douglas wrote in 1947. MARJORIE STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 9 (1997). The "river of grass" she described was seventy miles wide and several inches deep, and it flowed circuitously north to south. Time has brought significant changes to the plumbing of the Everglades but the starting line is still Lake Okeechobee and the prominent flows are still north to south. The S-9 structure at issue here reverses the flow and back-pumps stormwater and pollutants in huge volumes (the pumping capacity of the station is

1,861,392,900 gallons in 24 hours) into Water Conservation Area 3A, the so-called "Everglades Protection Area."[6] Much of the land upon which the Tribe lives, works, and uses for religious and cultural purposes, is located within Conservation Area 3-A and is adversely affected by the discharge of pollutants from the S-9 pumping station.

As the lower court recognized, "[t]he way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, relies upon the Everglades ecosystem and upon preservation of the Everglades in its natural state." *Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.*, 1999 WL 33494862 (S.D. Fla. 1999) *1. "Historically, islands of trees in the Leased Area have been the site of the Tribe's religious and cultural practices. The tree islands provide dry spots within the Everglades where tribal members can build traditional Indian huts known as chickees, and plant corn and other vegetables. An integral part of the Tribe's religious tradition is the spring planting of corn, accompanied by the Green Corn Dance. The tree islands also are a source of plants used in traditional tribal medicines." *Miccosukee Tribe of Indians*, 980 F. Supp. at 453.

This case is one of several chapters in the effort by the Miccosukee and others to protect the flora and fauna of the Everglades from pollution. In 1988, the United States filed *United States v. South Florida Water Mgmt. Dist.*, Case No. 88-1886 (S.D. Fla. 1988), based on the theory that state-sanctioned nutrient pollution in the Everglades Agricultural Area, just south of Lake Okeechobee, exacted

[6] 2002 Tiger, *supra* note 5, at 153-54.

a heavy ecological price on federal holdings further south, including the Miccosukee territory. The Miccosukee Tribe intervened in this case in 1992, and has maintained a vigorous and effective presence ever since. *See* William H. Rodgers, Jr., *The Miccosukee Indians and Environmental Law: A Confederacy of Hope*, 31 Envtl. L. Rep. 10918 (2001) (describing the litigation).

SUMMARY OF ARGUMENT

The Miccosukee Tribe brought suit against the South Florida Management District here simply to enforce a valid federal permitting scheme. The Tribe asserts that the S-9 pumping station, which indisputably pumps pollutants into the Everglades, is a point source that must obtain a National Pollution Discharge Elimination System (NPDES) permit. The Tribe does not ask for special favors to preserve its unique, vulnerable, and historic properties. It asks only for a fair chance to bring these "point source" laws of general applicability to bear on its current exigencies.

NPDES permitting is particularly appropriate in this case. As a national, federal permitting scheme it is particularly suited to balance and protect the competing sovereign interests at stake here. As in cases of interstate water pollution, the NPDES permitting process is the appropriate place to account for the negative impact the State's action is having on the Miccosukee Tribe, a separate sovereign entity. For instance, just as federal permitting would take into account any other affected states' standards in a similar situation, it can likewise take into account the Tribe's water quality standards. This Court

has confirmed that regulation of interstate water pollution has always been a matter of federal law. The NPDES permitting scheme merely formalizes what has always been within the ambit of federal regulatory powers.

In addition, as a national, federal scheme, the NPDES permitting process is best suited to address the issues of environmental justice and protection of tribal trust assets that are present here. Environmental protection at a national level, such as that available under the Clean Water Act's NPDES permitting scheme, can help ensure that the Miccosukee Tribe does not bear a disproportionate share of the "costs" involved here. As it stands now, without permitting, the Tribe is certainly bearing the brunt of those costs. While the District may be saving time and money by not obtaining a permit, the Tribe is suffering the utter degradation of its homeland. Clearly, state regulation is insufficient to protect the Tribe's interests in this regard as the State is unlikely to make decisions that would raise its own costs. State regulation is likewise insufficient as the State does not have the same fiduciary responsibility to protect the Tribe's trust assets that the Federal Government does. All of these considerations are consistent with the plain meaning of the Act.

The S-9 structure at issue here is a "point source" requiring a permit under the most mundane interpretations of the Clean Water Act. The District is the responsible owner and manager of this facility, controls its destiny, and is in the best position to improve its 1957-vintage performance. None deny that the C-11 canal and its S-9 back-pump outlet releases substantial pollutants in huge volumes into the pristine waters of the Everglades that is the legally protected home of the Miccosukee Indian Tribe. None deny that the waters pumped through the S-9

structure affect adversely the receiving waters, Indian interests, and the Everglades National Park. *See* J. App. 150, 167-69.

Arguments to the contrary are out of touch with the basic structure of the Clean Water Act. The District's claim that the Act excuses pollutants that "are merely passed through", *see* Pet'r Br. at 26-27, is repudiated by the universal experience of publicly-owned treatment works (POTWs). POTWs deal daily with the burden of treating, managing, and controlling pollutants that enter their systems, sometimes willy-nilly, from "indirect dischargers," both known and unknown. The United States as Amicus proposes to excuse transfers of polluted navigable waters "from one location to another." U.S. Amicus Br. at 13. It offers this rash – and potentially destructive – interpretation without a single word attempting to reconcile its reading with the strict statutory definitions of "pollutant" and "point source" that plainly reach activities that are dwarfed by the extravagant S-9 arrangement defended here.

ARGUMENT

I. THE INTRODUCTION OF POLLUTED WATERS BY ONE SOVEREIGN INTO THE WATERS OF ANOTHER SOVEREIGN IS PROPERLY THE SUBJECT OF FEDERAL REGULATION UNDER THE CLEAN WATER ACT AND THUS NPDES PERMITTING IS NECESSARY AND APPROPRIATE HERE AS THE DISCHARGE OF POLLUTANTS BY FLORIDA ADVERSELY AFFECTS INDIAN RIGHTS AND PROPERTY

The South Florida Water Management District (District) and several of its Amici argue that requiring a National Pollution Discharge Elimination System (NPDES) permit in the present situation would in some way upset the balance of federal-state power over water pollution regulation. They argue that the situation here is one concerning "water management and allocation" and that such a situation is one traditionally left to state control. Pet'r Br. at 35. Quite the contrary is true. While indeed, the Clean Water Act (CWA) envisions a partnership between the State and the Federal Government, the situation here is precisely the type that is meant to be addressed by federal regulation.

Here, the discharge of pollutants by a governmental entity of the State of Florida adversely is affecting the rights and property of another sovereign entity, the Miccosukee Tribe. Inter-governmental pollution such as this is traditionally regulated by the Federal Government, a fact that is reaffirmed by the CWA.

Congress has broad powers to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Min. and Reclamation Ass'n,*

Inc., 452 U.S. 264, 282 (1981). In the case of water pollution, the Court has repeatedly recognized that regulation of interstate water pollution is "primarily a matter of federal law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). This primacy of the federal government in the regulation of interstate water pollution was solidified in the 1972 amendments to the Federal Water Pollution Control Act and the creation of the NPDES, a federal permitting program. *Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981).

The NPDES permitting program covers situations where effluent discharges from one state negatively impact another state. In such situations:

> the CWA carefully defines the role of both the source and affected states, and specifically provides for a process whereby their interests will be considered and balanced by the source state and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution.

Ouellette, 479 U.S. at 497. One way for the federal government to take the interests of an affected state into consideration is to take the affected state's water quality standards into consideration and to condition issuance of NPDES permits on compliance with such water quality standards. *Arkansas*, 503 U.S. at 105-107. The same is true for water quality standards set by an Indian tribe. *City of Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (holding that 33 U.S.C. §§ 1341 and 1342 of the Clean Water Act give

the "EPA the authority to issue NPDES permits in compliance with a tribe's water quality standards"). The Clean Water Act also directs the EPA Administrator to "consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." 33 U.S.C. § 1377(e).

Since the pollution discharges in this case by an agent of the state of Florida are affecting the interests of another sovereign, the Miccosukee Tribe, the situation is analogous to interstate water pollution. Indeed, the analogy is particularly apt here, as the Tribe is recognized as a "State" under the Clean Water Act. *See* 33 U.S.C. § 1377(e).[7]

The gross water pollution descending the C-11 canal and pouring through the S-9 pumping structure is regrettably suggestive of the cross-boundary delivery of sulfur oxides in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), the downstream release of sewage in *Missouri v. Illinois*, 200 U.S. 496 (1906), and the cross-lake flow of

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[7] The Clean Water Act authorizes the EPA Administrator to treat tribes as states for purposes of the Act. Significantly, such treatment affords tribes the ability to set water quality standards, and hence to regulate their waters, in the same manner as states. Here, the Miccosukee Tribe has enacted such water quality standards. Miccosukee Environmental Protection Code Subtitle B: Water Quality Standards for Surface Waters of the Miccosukee Tribe of Indians of Florida http://www.epa.gov/ost/standards/wqslibrary/tribes/fl_4_miccosukee.pdf (visited Nov. 10, 2003); 66 Fed. Reg. 29951 (listing Miccosukee Water Quality Standards as approved by the Environmental Protection Agency).

effluent in *Milwaukee v. Illinois*, 451 U.S. 304 (1981). When this Court saw fit to preempt the interstate common law of nuisance with the comprehensive Clean Water Act in *Milwaukee v. Illinois*, it was not envisaging "opt-outs" of the dimensions attempted by the District here. As NPDES permitting is the appropriate tool for states to rely on where they are being affected by another state's pollution discharges, so too is it the appropriate tool in this situation.

II. CONSIDERATIONS OF ENVIRONMENTAL JUSTICE REINFORCE THE CONCLUSION THAT THE NPDES PERMIT PROVISIONS SHOULD BE APPLIED TO PROTECT TRIBAL LANDS

The environmental justice movement had its origins in 1982 in one of North Carolina's poorest counties "when local officials decided to locate a PCB landfill in a predominately African-American neighborhood." R.V. Percival, et al., Environmental Regulation: Law, Science, and Policy 446 (2d ed. 1996); *See* Richard J. Lazarus, *Fairness in Environmental Law*, 27 Envtl. L. Rep. 705 (1997); ROBERT D. BULLARD, DUMPING ON DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990). At a minimum, environmental justice has come to mean:

> The fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to negative effects of pollution due to lack of political or economic strength.

Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 Envtl. L. Rep. 10681 (2000) (quoting the "standard definition" developed in 1998 by EPA's Office of Environmental Justice), quoted in C. RECHTSCHAFFEN & E. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 6, 7 (2002).

Environmental Justice considerations have a special force in Indian country. *See* Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 Vt. L. Rev. 567 (1999). As articulated by Professor Judith Royster:

> Indian tribes connect to their lands not only on economic and emotional levels, but also on the levels of culture, religion, and sovereignty. Environmental degradation may, for example, affect land that is sacred to tribes, or pose a threat to the entire territory in which the tribe as government operates. And for Native American tribes, land is not fungible. Most tribes today occupy reservations carved out of their aboriginal territory, lands that the tribes occupied before white contact. The reservations are 'place': a homeland, a source of physical subsistence and spiritual sustenance. The loss of place may impact the identity and destiny of the tribe itself.

THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 157-58 (Michael B. Gerrard ed. 1999).

Here, the Miccosukee Tribe is being disproportionately burdened by the discharge of pollutants into its homeland. While S-9 is clearly protecting the people who live along Florida's lower east coast from flooding, and is ensuring

them a stable water supply, *see* Pet. Br. at 12, it is decimating the homeland and cultural existence of the Miccosukee Tribe. While, as several of the District's Amici allege, enforcing the permitting scheme here would entail certain expense, the enormous cost currently being suffered by the Tribe cannot be overlooked. Under the NPDES permitting scheme, principles of environmental justice can be taken into consideration. In fact, as declared by Executive Order, these principles must be taken into consideration by the Federal Government. Exec. Order No. 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (1994). The Executive Order states:

> To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States . . .

59 Fed. Reg. 7629.

Permitting under the federal NPDES scheme would also appropriately take into consideration the impacts on the tribal trust assets implicated here. Under the federal trust responsibility the United States and its officers are expected to meet exacting fiduciary standards in carrying out responsibilities affecting Indian tribes and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The interests being threatened here, including the threat to the Miccosukee Tribe's homeland, sovereignty, economic integrity, resources, and its right to

conduct its religious and cultural practices, are precisely the interests the United States is duty-bound to protect. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In the Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, Congress demonstrated its awareness of the importance of tribal interests in the Everglades when it provided that in exercising federal authority the Secretary of the Interior shall "fulfill his obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other legal obligations." *Id.* § 601(h)(2)(C). *See also Blue Legs v. United States*, 867 F.2d 1094, 1100, 1101 (8th Cir. 1989) (federal government's duty to the tribe under environmental statutes "is buttressed by the existence of the general trust relationship" and that "Congress intended that the obligations of BIA and IHS under the RCRA to be exercised consistent with their trust obligation.").

Environmental justice and trust considerations are consistent with the plain reading of the Clean Water Act's point source provisions. A contrary reading allows the District to treat the area of the Everglades most critical to the Miccosukee Tribe as a filter for polluted waters discharged by the S-9 pump.

III. THE S-9 STRUCTURE AT ISSUE HERE IS A POINT SOURCE UNDER SETTLED PROVISIONS OF THE CLEAN WATER ACT

Congress' definition of a "point source," powerful in its simplicity, is "any pipe, ditch, channel, tunnel, . . . from

which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The S-9 structure so obviously features "pipes," "ditches," "channels," and "tunnels" from which "pollutants" are liberally spewed that feats of imaginative interpretation would be required to exclude it from this definition. This is not a case of a far-fetched interpretation of point source. As this Court has held, the definition of point source already includes U.S. naval warplanes dropping ordinance in the waters of Puerto Rico, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and a sewage treatment plant fed by storm sewers and featuring system "overflow" points known as combined sewer overflows (CSOs), *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

The S-9 pump is a "point source" with structure, purpose, and function so plainly within the Congressional design that the District *conceded* that S-9 was a statutory "point source."[8] Despite this concession, the District attempts to avoid the point source characterization by arguing that it is not a conveyance "from which pollutants are or may be discharged," in order to escape the requirement of obtaining an NPDES permit for S-9. The District insists that a "discharge" occurs "when the pollutant originates from the point source, not when the pollutants are merely passed through." Pet'r Br. at 26-27. The United

[8] *See* Brief of Appellant South Florida Water Management District at 8, *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 280 F.3d 1364 (11th Cir. 2002) (No. 00-15703-CC), which states :

> There is no dispute that the S-9 pumping station is a 'point source,' that the waters passing through it contain low levels of pollutants, and that those waters constitute navigable waters for purposes of the CWA.

States as Amicus Curiae repeats the District's error.[9] The United States argues that the S-9 structure "merely conveys" pollutants, and hence, claims that there is no "addition." *See* U.S. Amicus Br. at 10, 12. It argues that the pumping station "merely transports [polluted] navigable waters from one location to another." *Id.* at 13. These arguments are unavailing and unworkable.

First, the definition of point source clearly includes structures that merely convey – i.e. "any discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). For example, storm sewers, which the S-9 facility very closely resembles, and which are customarily point sources, merely "convey."[10] Indeed, the whole panoply of

[9] In its Amicus brief, the United States states the Question Presented as follows:

> "Whether petitioner's longstanding practice of pumping accumulated water from a water collection canal to a water conservation area within the Florida Everglades constitutes an addition of a pollutant from a point source for purposes of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, where the water contains a pollutant, but the pumping station itself adds no pollutants to the water being pumped." U.S. Amicus Br. at 1.

[10] The S-9 structure at issue here compares most closely to a storm sewer. A storm sewer is a conveyance for conducting pollutants from roads, construction sites, and farms into the navigable waters. The storm sewer is a classical point source. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER POLLUTION Vol. 2 § 4.10 at 157-62 (1986). *See also* 33 U.S.C. § 1342 (p)(2)(E) (stating that while permits are generally not required for discharges "composed entirely" of stormwater, they are required for discharges that violate water quality standards, or are significant contributors of pollutants to waters of the United States; both conditions are satisfied here). As a result of the Water Quality Act of 1987 and a 13-years-in-the-making "Phase 2" storm water rule, all discharges from small municipal storm sewer systems and from 1- to 5-acre construction sites are now within the NPDES permit program. For background,

(Continued on following page)

run-of-the-mill point sources (trucks, helicopters, earth-moving equipment, etc.) are merely pass-through devices that do not physically generate the pollutants they carry to the water. The definition of point source also includes the clause "from which pollutants are or may be discharged." A discharge means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Exempting point sources under a "pass through" theory would violate the plain language of the Act. It would remove already polluted water from the category of "pollutant," a result which the Act does not contemplate. 33 U.S.C. § 1362(6) (defining "pollutant"). Such a result would excuse transfers of polluted waters from point A to point B where biological effects can be magnified many times. It would close the door on NPDES applications to water movements – uncontrolled ballast comes to mind – that is the source of the spread of exotic species and considerable ecological damage throughout the United States, including the Everglades.[11] It would make all the special corners and pockets and treasures of U.S. waters vulnerable to a creeping, degraded sameness if foul water is brought in from somewhere else.

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see Environmental Defense Center v. EPA, 319 F.3d 398, 405 (9th Cir. 2003) (emphasizing that the "foremost cause" of impaired ocean waters is urban runoff; upholding stormwater rules). The only functional difference between the S-9 structure and the hundreds of small municipal storm sewers is the enormous size and volume of the S-9 structure.

[11] An exotic is a nonindigenous species. *See* KIM TODD, TINKERING WITH EDEN: A NATURAL HISTORY OF EXOTICS IN AMERICA (2001).

Petitioners, and the United States as Amicus, incorrectly characterize this case as a water transfer case similar to *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). This is not a water supply case where drinking water is whisked about within one or more systems. This is not drinking water with trace pollutants; it is disposal water with gross pollutants. It is a pollution disposal case. The South Florida Water Management District directs a river of pollution (with flows up to 950 cfs) onto public and Indian properties of unique ecological value. The situation is also unlike that in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which explores whether dams are point sources. The status of dams as point sources is not presented by this case. Typically, a dam is a passive structure that interdicts flows with consequent biological effects. The S-9 structure is not a dam but a pump. It is not passive but active. It does not block water but moves it.

The Eleventh Circuit correctly stressed that "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." 280 F.3d at 1368; *See also* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER POLLUTION, Vol. 2, § 4.10 at 158 (1986) hereinafter Rodgers (stating that, "The statutory condition that a pollutant be 'added' to the stream is met if the source is the cause of the appearance of the pollutant regardless of the mechanism"). The S-9 structure is a back-pumping operation. Energy is applied to move this water – and the pollutants within it – into the backyard of the Miccosukee Indian Tribe. The District operates this pumping station and the discharges of pollutants from it. The "pollution" from this activity occurs

on its watch and within its jurisdiction. The District's assertion that S-9 is a mere conduit, an inanimate part of the piping, a stoic victim of problems from somewhere else and responsible for none of them, smacks of blaming the pump for human action and must be rejected.

In addition to the plain language of the Clean Water Act, other factors indicate S-9 is a point source subject to NPDES permitting. The ample case law exploring the contours of "point source" in the lower federal courts, indicate that a test of "controllability" best explains the distinction between "point sources" that need NPDES permits and nonpoint sources that do not. *See* Rodgers at 150-62. Here, the District is the responsible owner and manager of the S-9 structure, a situation found determinative for owners of other point source structures subject to NPDES permitting. *See, e.g.*, the owner of the dairy farm with its waste storage ponds, spray guns, and trucks in *Community Ass'n for Restoration of the Environment (CARE) v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129 (E.D. Wash. 1999), the owner of the waste rock piles at the molybdenum mine in *Amigos Bravos v. EPA*, 324 F.3d 1166 (10th Cir. 2003), the owner of the storage bin with "spent mushroom substrate" releasing a "black oil-like" leachate into the water in *Reynolds v. Rick's Mushroom Service, Inc.*, 246 F. Supp. 2d 449 (E.D. Pa. 2003), the owner of the abandoned mine (with ditches, pipes, channels, and gullies) in *Comm. to Save Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994), the owner of the net pen salmon farms in *United States Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 257 F. Supp. 2d 407 (D. Me. 2003) (escaping "non-North American strains of Atlantic salmon" are the "pollutants"), the owner of the

groundwater pumps that release their "salty" byproduct into the Tongue River in *Northern Plains Resource Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003), *cert. denied*, ___ U.S. ___, 72 USLW 3148 (Oct. 20, 2003), and the owner of the chicken farms whose pollution wended its way into the drinking water of the City of Tulsa. *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003). Like with these examples, the District here has an active and affirmative hand in directing the delivery of pollutants into the Everglades and into the "Indian country" protected there. The South Florida Water Management District, like the owners in the cited examples, must obtain an NPDES permit to operate S-9.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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